My method is now being used by many large reputable firms and corporations in this city, to whom I would be pleased to refer you.

I shall be pleased to call upon you and explain in detail.

Very truly yours,
A. B. C."

ANSWER

It is the opinion of this Committee such solicitation of business is improper.

QUESTION:

"A" defended a divorce action brought against "X," against whom a decree of absolute divorce was rendered in New York State. The final decree having been signed, and "X" desiring to marry the corespondent, sought the advice of "A" as to how this could be done by her without incurring any penalty in the State of New York. "A" advised her to go to Connecticut and marry there, and furthermore accompanied her and the corespondent to Connecticut and "gave her away."

Do you consider that "A" has done anything which should subject him to censure?

ANSWER:

The question involves two inquiries. The first relates to the lawyer's duty to his client, to wit:

(1) Is the lawyer censurable for having advised his client that she might lawfully proceed contrary to the letter of the decree?

The second involves the lawyer's duty to the profession and perhaps to the court and to the community:

(2) Is he censurable for having facilitated and taken part in a marriage-ceremony which was contrary to the letter of the decree?

A minority of this Committee are firm in the conviction that the conduct of the attorney is censurable in respect to both aspects of the question.

A majority agree that:

(1) It was not improper for the lawyer, when asked to advise upon that point, to inform his client that the prohibition against the remarriage of the guilty party contained in the decree in a divorce action, is a penalty which neither has, nor was intended by the Legislature to have, any effect beyond the borders of the state; and to advise her that she might contract a marriage in Connecticut which would be recognized as valid in New York, and would not be punishable as a contempt of court.

(2) The attorney's conduct in facilitating and participating in the marriage ceremony in Connecticut is likely to be misunderstood, owing to tne very general misapprehension as to the scope of such a decree. For this reason such conduct tends to diminish public respect for the profession, if not for our courts and their decrees, and (unless justified by circumstances not disclosed in the question, and done with the purpose of avoiding still greater evils to follow) is open to criticism.

The Committee had before them Sections 6 and 8 of the Domestic Relations Law, and cases such as Thorp v. Thorp, 90 N. Y. 602 ,and Van Voorhis v. Brintnall, 86 N. Y. 18.

TRUSTS—CHARITABLE USES—WHEN SUSTAINED—A question arose in *Re* Cunningham's Will[1] upon the validity of a gift in the testator's will of fifty thousand dollars, to his executors, "to be by them applied in their best judgment and discretion to such charitable and benevolent associations and institutions of learning for the general uses and purposes of such associations and institu-

[1] 100 N. E. Rep. 437 (N. Y., 1912).

tions as my said executors may select and in such sums respectively as they may deem proper." The court held the gift to be a valid charitable bequest.

Charities have been variously defined, but their scope has been expressed with unusual clearness by Mr. Justice Gray in *Jackson* v. *Phillips*:[2] "A charity in the legal sense may be defined as a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."

The early history of the law of charitable trusts is extremely obscure, and there is considerable uncertainty regarding their origin and growth.[3] The cases point to an origin in the civil law, but at an early period the doctrine had become part of the common law. The general objects which come within the description of "charitable uses" were enumerated in the Statute of Charitable Uses passed in the reign of Queen Elizabeth;[5] "The relief of aged, impotent, and poor people; the maintenance of maimed and sick soldiers and mariners; the support of schools of learning, free schools, and scholars of universities; repairs of bridges, ports, havens, causeways, churches, sea-banks and highways; education and preferment of orphans; the relief, stock and maintenance of houses of correction; marriage of poor maids; aid and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners and captives; aid of poor inhabitants concerning payment of fifteenths, setting out of soldiers, and other taxes." Both English and American Courts, however, have never regarded this enumeration as exhaustive, and those purposes are deemed charitable in the legal sense "which the statute of 43 Elizabeth enumerates or which by analogy are deemed within its spirit and intendment."[6]

It is well settled in England that if the donor sufficiently shows his intention to create a charity, and indicates its general nature

---

[2] 14 Allen 539 (Mass., 1867).

[3] See Perry on Trusts, Section 689, *et seq.*; Flint, Trusts and Trustees, Section 268.

[4] White v. White, 1 Bro. Ch. 12 (Eng., 1778): "The cases have proceeded upon notions adopted from the Roman and civil law, which are very favorable to charities, that legacies given to public uses, not ascertained, shall be applied to some proper object." And see Moggridge v. Thackwell, 7 Ves. Jr. 36, 69 (1803); Williams v. Williams, 8 N. Y. 525 (1853); Jackson v. Phillips, 14 Allen 539, 554 (Mass., 1867).

[5] 43 Elizabeth, c. 4. For a discussion of this statute and the "Legal Meaning of Charity," see Laws of England, Earl of Halsbury, Vol. 4, p. 106, *et seq.*, and Tudor on Charities and Mortmain, Fourth Edition, p. 13.

[6] Morice v. Bishop of Durham, 9 Ves. 405 (Eng., 1804), 10 Ves. 522 (Eng., 1805); Jackson v. Phillips, 14 Allen 539. 551 (Mass., 1867); *In re* Foveaux, 2 Ch. 501 (Eng., 1895).

and purpose, the trust will be sustained and enforced, although there may be indefiniteness in the declaration and description and although much may be left to the discretion of trustees.[7] This uncertainty, however, must not be carried too far. The intention of the donor to create some kind of *charity*, religious, benevolent, educational, or otherwise, must not be left uncertain,[8] an the purpose, whatever be its particular object must benefit some indefinite class or portion of the *public*, for mere private charities are governed by the rules which apply to ordinary private trusts, as the rule against perpetuities, and that requiring definiteness as to the beneficiaries of the trust.[9]

In administering charitable gifts, the English courts have leaned so strongly in favor of sustaining these trusts, even when the donor's specified purpose becomes impracticable, that they have fully established the so-called doctrine of *cy pres*, under which, where there is an intention exhibited to devote the gift to charity, and no object is mentioned, or the particular object fails, the court will execute the trust *cy pres*, or as nearly as possible, in accordance with the expressed intention.[10]

In this country the doctrine of charitable trusts has not every-

---

[7] So Whicker v. Hune, 14 Beav. 509 (1851): Gift to trustees "to apply in such manner as they in their uncontrolled discretion should think proper for the benefit, advancement, and propagation of education and learning in every part of the world;" and Lewis v. Allenby, L. R. 10 Eq. 668 (1870): bequest of residue of personalty to trustees, "to divide among such charities in England as they in their sole and uncontrolled discretion shall think proper." Similarly indefinite gifts were upheld in Attorney General v. Herrick, Amb. 712 (1772); Nash v. Morley, 5 Beav. 177 (1842); Townsend v. Carus, 3 Hare 255 (1844); Wilkinson v. Lindgren, L. R. 5 Ch. 570 (1870); *In re* White, 1893 2 Ch. 41; *In re* Darling, 1896 1 Ch. 50.

[8] In Morice v. Bishop of Durham, 9 Ves. 405 (1804), 10 Ves. 522 (1805), a bequest to a trustee "for such objects of benevolence and liberality, as the trustee in his own discretion shall most approve," was held void, on the ground that the words used did not necessarily apply to a charity in the legal sense. In Kendall v. Granger, 5 Beav. 300 (1842), the words "general utility" were said to comprehend purposes not charitable. The same rule has been applied in England to the expressions "charitable *or* benevolent purposes," "charitable or public purposes," etc.: Vesey v. Jameson, 1 Sim. & St. 68 (1822); Williams v. Kershaw, 5 Clark & F. 111 (1835); Ellis v. Selby, 1 My. & Cr. 286 (1836); *In re* Jarman's Estate, L. R. 8 Chan. Div. 584 (1878); *In re* McDuff, 1896 2 Ch. 451; Blair v. Duncan, 1902 A. C. 37.

But where the expression "charitable *and* benevolent institutions is used, the English courts have held the gift valid, as meaning charitable institutions which were also benevolent: Miller v. Rowan, 5 Clark & F. 99 (1837); *In re* Best, 1904 2 Ch. 354.

[9] Pomeroy's Equity Jurisprudence, Section 1020; Tudor, Charities and Mortmain, Fourth Edition, p. 37; Gibbs v. Rumsey, 2 V. & B. 294 (1813); Fowler v. Garlike, 1 Russ. & M. 232 (1830); Jackson v. Phillips, 14 Allen 539 (Mass., 1867).

[10] See "The Doctrine of *Cy Pres* as applied to charities," McGrath; Flint, Trusts and Trustees, Sec. 232; Tyssen, Charitable Bequests, p. 440 *et seq.*; Tudor, Charities and Mortmain, Fourth Edition, p. 140; Bispham, Equity, Section 126. Cases both in England and this country, wherein the doctrine of *cy pres* is considered and applied, are collected and explained by Mr. Justice Gray, in Jackson v. Phillips, 14 Allen 539 (Mass., 1867).

where been so fully upheld. In many of the states the English theory seems to have been accepted with little or no modification: while mere indefiniteness in the designation of beneficiaries will not invalidate the charitable trust,[11] yet it must clearly appear that a *charity* in the legal sense is intended and not some other object, however worthy.[12] In these jurisdictions the courts have sometimes gone farther, and repudiated the English distinction between "charitable" and "benevolent" or kindred words, or at least have shown a strong inclination to infer from the context of the will that such words are used as synonymous with "charitable."[13] In other states, more certainty in defining the purposes of the charity and the classes of persons who are intended to be the beneficiaries is required in order to sustain the gift, than is necessary under the English rule.[14] It seems impossible to formulate any more specific American rule, since there is a radical difference in the theories and fundamental views prevailing in the various states.

The New York courts had held numerous charitable gifts, which would clearly have been upheld in England, invalid for uncertainty,[15] and the Act of 1893[16] may be said to be the direct result of the decision in the *Tilden will* case,[17] in which the charitable trust, which the testator attempted to establish, was adjudged invalid on account of the indefiniteness and uncertainty of the

---

[11] Going v. Emery, 16 Pick 107 (Mass., 1834); Wells, Executor v. Doane, 3 Gray 201 (Mass., 1855); Saltonstall v. Saunders, 11 Allen 446 (Mass., 1865); Fellows v. Miner, 119 Mass. 541 (Mass., 1875); Derby, Executor, v. Derby, 4 R. I. 414 (1856); Treat's Appeal, 30 Conn. 113 (1861); Miller v. Atkinson, 63 N. C. 537 (1869); Everett v. Carr, 59 Me. 325, 334 (1871); Craig v. Secrist, 54 Ind. 420 (1876); Clement v. Hyde, 50 Vt. 717 (1878); Goodell v. Union Association, 29 N. J. Eq. 32 (1878); Hunt v. Fowler, 121 Ill. 269 (1887); Fox v. Gibbs, 86 Me. 87 (1893).

[12] Thompson's Executors v. Norris, 20 N. J. Eq. 491 (1869); Nichols v. Allen, 130 Mass. 211 (1878); Bristol v. Bristol, 53 Conn. 242 (1885).

[13] See note 8, *supra*; Saltonstall v. Sanders, 11 Allen 446 (Mass., 1865); Rotch v. Emerson, 105 Mass. 431 (1870); Pell v. Mercer, 14 R. I. 413 (1882); Weber v. Bryant, 161 Mass. 400 (1894); Murphey's Estate, 184 Pa. 311 (1898).

[14] Needles v. Martin, 33 Md. 609 (1870); Attorney General v. Soule, 28 Mich. 153 (1873); Heiss, Executor, v. Murphey, 40 Wis. 276 (1876); Johnson v. Johnson, 92 Tenn. 559 (1893); Moran v. Moran, 104 Ia. 216 (1897).

[15] The opinion of Rapallo, J., in Holland v. Alcock, 108 N. Y. 312 (1888), contains an exhaustive review of the earlier New York decisions, and see Fosdick v. Town of Hempstead, 125 N. Y. 581 (1891); Rose v. Hatch, 125 N. Y. 427 (1891); People v. Powers, 147 N. Y. 104 (1895): decided subsequent to Act of 1893, but the will was considered as of the date of testatrix' death, prior to the act.

[16] Laws of 1893, Chapter 701, now embodied in Personal Property Law, Section 12 (Consolidated Laws of 1909, c. 41) providing that:

"1. No gift, grant or bequest to religious, educational, charitable or benevolent uses, which shall in other respects be valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. . . . .

"3. The Attorney General shall represent the beneficiaries in all cases and it shall be his duty to enforce such trusts by proper proceedings in the courts."

[17] Tilden v. Green, 130 N. Y. 29 (1891).

beneficiaries. Notwithstanding the effect of this legislation, providing that no gift to religious, educational, charitable, or benevolent uses, in other respects valid, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as beneficiaries, it is still necessary in New York for a testator "to define his purpose and intention in making a trust sufficiently so that the court, at the instance of the Attorney General representing the beneficiaries, can by order direct in carrying out the trust duty."[18]

If, however, the gift is clearly within the legal conception of a "charity" mere indefiniteness or uncertainty in the designation of the beneficiaries is no longer objectionable; under the decision in *Matter of Robinson*[19] and in our principal case, the Court of Appeals of New York appears to have adopted the English rule upon the subject. The change in the law of that state is but illustrative of the modern tendency to uphold charitable bequests and in so doing obviously to benefit the community as a whole.

H. A. L.

---

[18] Matter of Shattuck, 193 N. Y. 446 (1908).
[19] 203 N. Y. 380 (1911).